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No. 224

Supreme Court of the United States

OCTOBER TERM, 1946.

J. K. DUNSCOMBE, PETITIONER,

VS.

SCOTT W. LOFTIN & JOHN W. MARTIN, AS TRUSTEES FOR FLORIDA EAST COAST RAILWAY CO., DEBTOR, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Supreme Court of the United States:

J. K. Dunscombe, the petitioner in the bankruptcy court, respectfully petitioning, shows the court as follows:

STATEMENT OF MATTERS INVOLVED.

The petitioner seeks a review of a decision of the United States District Court for the Southern District of Florida refusing to relax its 15 year stay of suits against the bankrupt railroad and determining the merits of the controversy at a summary hearing, without affording due

process of law and assuming jurisdiction to determine questions of fact that the federal court had no authority to hear. This decision was appealed to the Circuit Court of Appeals for the 5th Circuit and affirmed and which decision appears under the reports as J. K. Dunscombe, appellee, v. Scott Loftin *et als.*, ____ F. 2d ____.

Petitions for rehearing were sought and denied in both lower courts.

The basis for the claim of right to sue the receivers arose from the following circumstances: The Florida East Coast Railway Company, which will hereinafter be called the Railway had been in bankruptcy for some fifteen years and the district judge had entered a stay order against suits unless permission first obtained. About five years before the Railway had been adjudicated a bankrupt and the stay order granted, it had taken a strip of land about a mile and a half long on the east edge of Commissioner's Lot 3 of the Hanson Grant. It used this land for building a double track railroad upon, dug holes for barrow pits and threw up a grade and evidenced claims of ownership in such manner in 1926 and at which time the petitioner claimed she was the owner of this land, but that the railway had no deed or title to this land of any nature. Under the Florida law a railway corporation with the right of eminent domain can take what property it needs in order to perform its functions, for which it was chartered, without first purchasing or condemning such land and after it is in possession take steps to acquire such property or if it fails to take any action the owner can claim a vendor's lien for the value of the property so taken and go in the State Circuit court in the County in which the land is located and seek to enforce the vendor's lien and under the Florida law a 20 year statute of limitations is applicable to vendor's lien actions.

In this case the petitioner asserts her land was taken for such public use in 1926 and absent any stay order that tolled the statute of limitations, her right to enforce her lien had not expired when she petitioned the District Court to relax its stay order and permit her to enforce her vendor's lien in the State Circuit Court for Martin County, Florida.

She traced her title or claim to this property as follows: The land was in a Spanish Grant and there were in 1891 a large number of joint tenants in common claiming the same. One Annabelle Robertson at that time brought a suit to have that grant partitioned in the same federal court, made her other joint tenants defendants and also included the Railway, which she claimed was asserting a claim but had no interest. She prayed that the claims and amounts thereof be determined and the grant partitioned accordingly. The Court upon investigation found the Railway held a deed from a joint tenant to an entire interest and found it void, determined who the lawful claimants were and what their respective interests were, found the Railway had no claim of any nature, appointed three partition commissioners and instructed them to partition the grant among those found to have lawful claims and according to their respective interests.

The commissioners proceeded to partition the grant, they found a single track railway running across the grant, awarded the Railway nothing, but used this track as a dividing line between lots 2 and 3. Lot two being on the east side of this line and Lot 3 on the west. The court confirmed this plan of division and the allotments to the various claimants and in the conclusion of the final decree stated "that the Railway was entitled to land it then had its single track upon and used for the operation of the railroad."

The petitioner does not question the right of the Judge to in this manner give the property of the joint tenants to the Railway as long as this gift or grant does not claim to extend beyond the land it then had its single track railroad on. She was not the owner of any land in the Hanson Grant at that time and has no claim for any land so taken at that time.

In 1913 Sewall's Point Land Company, that held the title to Lots 2 and 3 of the commissioner's partition, platted these lots and showed thereon a reservation of 100 feet in width, the center of which was the middle of the single track railroad. There was no dedication on this plat to any land to the railroad nor did the Railway assert any open claim to any more land, it did not fence or exhibit any claim to this land necessary to put a purchaser on notice but simply continued to use the single track railroad.

In 1919 the Land Company executed a contract for deed for all of Lot 3 to the petitioner's husband and conveyed the land by warranty deed in 1921 and at which time there was not exhibited any claim of the Railway to any more land than it was using in 1891. Lot 3 was then conveyed to Florida Growers a corporation and the petitioner owned all the stock thereof in 1926 when the Railroad in 1926 entered on this land and took this mile and a half strip to build its double track upon. Florida Growers Company was thereafter dissolved and title to this land went to the petitioner as the sole stockholder.

Failing to take any affirmative action to acquire this land, petitioner was about to bring her vendor's lien suit in 1931 when the Railway went into bankruptcy and procured the stay against suits. She then waited for 15 years for dissolution of the stay order but as it appeared the receivership was to be indefinite she applied to the court to relax the stay and permit her to sue

receivers in a court of proper venue and jurisdiction (Record p. 3).

The hearing on this petition was set in Jacksonville, Florida, and she understood the only matters that would be determined at that hearing was if her claim was a valid existing claim and if it would be unreasonable to ask the receivers to defend such a suit. As there was no basis for any jurisdiction of a federal court to determine anything but the questions above stated and the only reason she ever appeared in the federal court was for leave to sue the receivers and which except for the bankruptcy proceedings would have had nothing to do with the matter, she was not prepared nor were there any issues on the merits of her claim developed.

On the day of the hearing the respondents filed a large mass of objections which on their face showed there was an existing controversy over the title to this land. But these were questions of fact that only the State Circuit Court had any jurisdiction to determine, after allowing both parties due process of law to assert their claims and rebut those of their opponents.

In order to induce the district court to try the contested questions of fact the Railway offered in evidence a great mass of maps and plats and the district court in this summary proceeding assumed jurisdiction to determine such questions and without allowing any issues to be developed or affording the petitioner any opportunity to offer evidence to sustain her claims and rebut those of the respondents.

The District Court held (Record p. 31), that the Railway had acquired title by adverse possession, regardless of the fact there was no such issue and the petitioner had claimed the holding was permissive and subject to the vendor's lien. It also held that she was guilty of laches regardless of the fact the Railway had asked for and the same court had granted the stay against suits.

Absent any tolling of the statute of limitations by the stay order, the time had not run in which the vendor's lien could be enforced so neither of such findings could be held to be responsive. Petitioner therefore filed her petition for a rehearing (Record p. 32) and pointed out that she had not asked leave to sue in ejectment and probably under the Florida law ejectment does not lie if the Railway can lawfully enter without purchase nor did the claim she held a vendor's lien support any such theory. Owners of property don't hold adversely to lien holders but hold subject thereto.

Nor should the court charge the petitioner with laches in not doing what it had forbidden her to do or would have been in contempt had she disregarded the order. That is hardly consistent and furthermore absent any stay order the time had not run within which to bring the suit to enforce the lien.

The rehearing was denied and appeal taken to the Circuit Court and it not only affirmed the District Court but made added findings that the land was in adverse and hostile possession of the Railway when the Land Company conveyed it in 1921.

Where it finds anything in the record to support such a finding of fact that it had no jurisdiction to determine it does not state. However, in the last paragraph of page 17 of the record, in order to support its claims of adverse possession, the Railway claimed that for 25 years it had allowed other corporations with the right of eminent domain to maintain poles and wires on the *east* side of its tracks and which poles were located in Lot 2 and to which land the petitioner asserted no claim. Whether a corporation with the right of eminent domain can acquire title to land of others by adverse possession is not in question but even if it could, it could hardly acquire possession of petitioner's property by

using the property of others. Petitioner's land lay on the west side of the single track and the adverse possession claimed was on the east side of the track.

Due process of law does not contemplate a court that has no jurisdiction of the subject matter or the parties determining their rights in a summary proceedings and without issues developed and allowing each party its day in court nor does the Federal or State Constitutions contemplate that private property be taken for public use without payment or by a corporation going into bankruptcy, issuing an indefinite order to file claims of common creditors (see paragraph 6, Record p. 45) and not notify the petitioner it had dissaffirmed its holding of the land upon which the double track was laid.

BASIS OF JURISDICTION.

Jurisdiction to review a judgment of the Circuit Court of appeals is vested in this court under Title 11, Section 347 (c) to review cases arising out of bankruptcy proceedings and this court has further jurisdiction to review this case under Section 262 of the Judicial Code to inquire into whether the District Court and the Circuit Court of Appeals had any jurisdiction to determine without due process of law, questions of fact that the State Circuit Court for Martin County, Florida, had exclusive jurisdiction to determine.

On the face of the record the questions of fact to be determined by the latter court were whether the land conveyed by the Land Company in 1921 was in adverse possession of the railroad at that time and which in itself appears to be a novel question and what the value of the land was at the time of the taking.

QUESTIONS PRESENTED.

FIRST QUESTION.

Can the district federal court dispose of a contested claim by a summary proceeding in bankruptcy, on an application for leave to sue the bankrupt?

SECOND QUESTION.

Can the federal district court claim that because a Florida corporation is adjudged a bankrupt that extends the jurisdiction of the federal court to hear and determine matters of law and fact that are in the sole jurisdiction of the State Court?

THIRD QUESTION.

Can a federal court construe leave to foreclose a vendor's lien as an application to sue in ejectment and can the equitable rule of laches be applied when on the face of the action the statute of limitations has not run against the claim and under the law of Florida injury from laches are questions of fact to be proven?

FOURTH QUESTION.

If the District court was wrong in assuming jurisdiction and in its judgments, was the Circuit Court of Appeals in error in not only affirming the lower court but also making added findings of fact for which there was no basis in the record?

FIFTH QUESTION.

If the Federal and State Constitutions forbid taking private property for public use without payment, can one with the right of eminent domain proceed by indirection and acquire such property by any other method?

SIXTH QUESTION.

Was the respondent guilty of padding the record on appeal?

STATEMENT OF EVIDENCE.

There is no evidence other than the mass of exhibits offered in evidence and included in the record by the respondents. The petitioner was never given any opportunity to offer any.

OFFICIAL OPINIONS.

The decisions of the Federal District Court do not appear to be reported but they appear on pages 31 and 37 of the record. The opinion of the Circuit Court of appeals also is included in the record on appeal.

REASONS RELIED UPON FOR WRIT OF CERTIORARI.

I.

The decisions of the courts below are in conflict with the decisions of this court and those of the Circuit Court of Appeals for all other Circuits and in conflict with the petitioner's Federal Constitutional rights in denying her due process of law, her right to a jury trial and taking her property for public use without payment.

Barber Asphalt v. *Standard Asphalt*, 275 U. S. 372.

Barton v. *Barbour*, 104 U. S. 126.

Hill v. *Gordon*, 45 Fed. 276, 149 U. S. 775.

Kindred v. *U. P. R. R. Co.*, 255 U. S. 591.

May v. *Henderson*, 268 U. S. 111.

Nor. Pac. Rlwy. v. *Smith*, 171 U. S. 260.
Nor. Pac. Rlwy. v. *Concannon*, 239 U. S. 382.
Peale v. *Phipps*, 14 How. 368.
Slide & S. Gold Mines v. *Seymour*, 153 U. S. 509.
Williams v. *Parker*, 188 U. S. 891.

Circuit Court of Appeals Cases.

Re Barnes, 203 Fed. 883.
Buler v. *Schumacher*, 71 F. 2d 831.
Donneaux v. *Fox*, 300 Fed. 800.
Field v. *Kansas City Ref. Co.*, 296 Fed. 800.
First Trust v. *Baylor*, 1 F. 2d 24.
Re Lane Lumber Co., 217 Fed. 550.
Re Makin, 28 F. 2d 417.
Morgan v. *Patillo*, 297 Fed. 140.
Maxwell v. *Engrebretzen*, 74 F. 2d 93.
Re Nine North Church St., 82 F. 2d 186.
Re Roberts, 16 Fed. Supp. 424.
Re Wakley, 50 F. 2d 869.

In *Nor. Pac.* v. *Concannon*, 239 U. S. 383, the court held that under the restraint of the Constitution a carrier with right of eminent domain cannot acquire private property for public use by adverse user. And as the *Makin case* points out, 28 F. 2d 417, that where there is no diversity of citizenship the claimant is entitled to a plenary suit in the state court to determine contested matters of law and fact.

In *Hill* v. *Gordon*, 45 Fed. 276, and appeal dismissed 149 U. S. 775, it was held that a delay of 20 years by a lienholder did not bar the right to enforce the claim and laches was not a defense. Furthermore, the Florida courts hold that laches is a question of fact to be proved and show injury from the delay and the federal courts

sitting in Florida where they have jurisdiction are required to follow such rule.

II.

The decisions of the courts below are in violation of the petitioner's State Constitutional rights and are in conflict with the decisions of the State Supreme Court ruling on similar questions.

Secs. 1-12 of the Florida Declaration of Rights.

Article Four and Article Sixteen, Section 29, of the State Constitution assures the petitioner, that the courts of that state will always be open to hear her claims and justice will be administered without sale, denial and delay. That her property will not be taken for public use without payment and she will be afforded due process of law.

Federal Land Bank v. *Brooks*, 190 So. 737.
Florida Sou. Rlwy. v. *Hill*, 23 So. 566.
Florida Cent. Rlwy. v. *Bell*, 31 So. 259.
Getzen v. *Sumter County*, 103 So. 104.
Hillsboro County v. *Kensett*, 144 So. 393.
Miami v. *F. E. C. Rlwy.*, 84 So. 726.
Palmetto v. *Katch*, 98 So. 352.
Rosenbaum v. *State Road Dept.*, 177 So. 220.
S. A. L. R. R. v. *Spec. R. & B. Dist.*, 108 So. 689, 46 A. L. R. 870.
Sarasota v. *Dixon*, 1 So. 2d 198.
Wilken v. *Grove*, 19 So. 2d 534.

As stated in *Cone Bros.* v. *Moore*, 193 So. 288, Laches in equity suits in Florida is *a question of fact* and in *Wilken* v. *Groves*, 19 So. 2d 534, the facts must show the defendant has been injured, embarrassed or placed at a disadvantage by the delay. And as stated in *Sarasota* v. *Dixon*,

1 So. 2d 196, if the property is in the hands of a court receiver laches and statutes of limitations *do not run* in respect to possession or the right of possession of such property.

It might be further pointed out that when this same district judge was on the Florida Supreme Court he wrote the opinion in *S. A. L. R. R.* v. *Special R. & B. Dist.*, 108 So. 689, and after a review of cases all over this country he held that adverse possession could not be claimed by or against a carrier especially where the land was a grant. However it might be pointed out the claim of adverse possession was a straw man raised by the court on its own motion. The law gave the petitioner no other election than to claim the taking was permissive and claim a vendor's lien for the value and vendor's liens in Florida are good for 20 years. *Shaylor* v. *Cloud*, 57 So. 666, 1914A, Ann. Cas. 277; *Sonderberg* v. *Davis*, 159 So. 23, and *Rosenbaum* v. *State Road Dept.*, 177 So. 20.

III.

The circuit court of appeals has so far departed from accepted procedure and has also sanctioned a departure from accepted procedure in an important matter affecting procedure generally, in cases rising out of bankruptcy proceedings, throughout the country, as to call for the exercise of supervision by the Supreme Court.

As stated in Justice Miller's dissenting opinion in *Peale* v. *Phipps*, 14 How. 368, and later recognized by Congress, that because a corporation becomes a bankrupt and a federal court appoints a receiver does not enlarge its jurisdiction nor does it deny the right to a jury trial in the state court if there is no diversity of citizenshp.

Nor does it confer dictatorial powers of federal district judges to try and determine in a summary trial

whether or not a claimant can prove her claim in the State Court, deny her due process of law and refuse to relax his orders against bringing suits for no good cause shown and deprive her of her state constitutional right or assurance that the courts of Florida would always be open to hear her claims and justice would be administered without sale, denial or delay.

Due to the rather strained construction of the State Constitution and the effect of delay in bringing a suit to enforce a claim for payment for land taken where the state statute permits or authorizes a railway company to enter upon private property without any other claim of right, take what it needs to perform the functions for which it was chartered to perform and at the same time observe the restraint against taking private property without payment makes it necessary that this court speak on that question when such a matter arises in the federal court solely due to the fact a Florida corporation became bankrupt and the federal courts having exclusive jurisdiction of bankruptcy proceedings, appointed receivers for that corporation and issued an injunction against suits against its own appointees without its permission.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the 5th Circuit, commanding that court to certify and send to this court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings; if the transcript already filed be deemed insufficient, in the cause entitled J. K. Dunscombe, appellant, vs. Scott W. Loftin and John W. Martin, trustees for debtor, Florida East Coast Railway Company, appellees, and that the judgment of the said Circuit Court of Appeals and the United States Dis-

trict Court for the Southern District of Florida in said cause by this court be reversed and petitioner have such other and further relief as this court may determine.

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BRIEF.

ARGUMENT.

Preamble.

The complaint here is that a Federal District Court that had no jurisdiction of the subject matter in a cause arising out of a bankruptcy proceeding went into the merits of the controversy in a summary proceeding and without allowing due process of law determined the rights of the petitioner without any evidence and contrary to the law of the State in such cases and which laws should have been applied if the Federal Court had any jurisdiction to hear the matter.

That the C. C. A. on the appeal sustained this type of procedure and in addition made findings of fact and for which there was nothing in the record to support, and no such questions were even before it on the appeal from the District Court.

It might here be pointed out that the petitioner never made any attempt to bring a suit in the federal court, could not have maintained one had she done so and the only reason she appeared in the Federal Court was to ask that court to relax its injunction against suing the bankrupt, and which stay had been prolonged long beyond the dictates of any need therefor and was in fact a violation of her State Constitutional rights under Section 4 of the Florida Declaration of Rights which assured her the courts of that state would *always be open to hear her demands* and administer justice without *denial,* sale or *delay.*

that because some corporation becomes bankrupt and a petition in bankruptcy is filed in the Federal Court does not give that court added jurisdiction to hear and determine matters it is not given jurisdiction to otherwise hear.

The question involved was whether the Florida East Coast Railway Company ever acquired title or right of use of a part of its right of way, that the applicant for leave to sue in State court held had been appropriated without payment or payment secured.

Without being permitted to bring any suit or allowed any opportunity to present her claims and offer evidence to support them and testimony to rebut the claims of the Railway the District Court in a summary proceeding, determined all the issues of law and fact without any evidence to support such findings and raised and determined questions that were not before it.

The C. C. A. on the appeal fell into the same error and even went further and such procedure is in conflict with all the decisions of this court and in conflict with the decisions of the other C. C. A.'s this matter is brought up here on certiorari in order that this court can rectify and correct such variance.

Why it is even necessary for this Railroad to continue in bankruptcy for 15 years; when it is far more prosperous than it ever was before it was adjudged a bankrupt, this petitioner is not interested in, except for the fact that during this period the injunction against suits of this nature continued and to avoid being held in contempt of court she had to make the application to sue.

The purpose of citing the Florida Supreme Court decisions as to the law in such cases is simply to point out to this court that had the Federal Court any jurisdiction of the matter and had applied the law of Florida, it could not have been sustained.

If the applicant for leave to sue claims to hold a vendor's lien for the value of the property taken and not paid for and the defense is the railway has acquired title by adverse possession such a defense is not appropriate because debtors who have liens on their property don't hold adversely but hold subject, nor according to the decisions of this court and the Florida Supreme Court can a corporation with the right of eminent domain, acquire title to property in this manner and not violate the constitutional restrictions against taking private property for public use, especially where a state law authorizes the corporation to enter and take, without making any attempt to acquire or condemn.

How the C. C. A. could find that the property was in adverse possession of the Railway when the Land Company executed its deed in 1921, when that was a contested fact and which leave was asked to be established in the suit in the State Court and such leave denied; with no evidence in the record to support it; appears to be a serious prejudgment based on an unsupported conclusion.

Or how the court could find the applicant was guilty of laches in applying, when it had forbidden her to sue and laches under the Florida law was a question of fact and no evidence had been adduced to show any injury from the alleged delay.

The foregoing may give the court a better insight into this matter and show why the errors are assigned.

Art. XVI, Sec. 29, of Florida Constitution:

No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall first be made to the owner or first secured to him by a deposit in money; which compensation irrespective of any benefit from any

improvement proposed by such corporation or individual, shall be ascertained by a jury of 12 men *in a court of competent* jurisdiction, as shall be provided by law.

Sibley v. *Volusia County*, 2 So. 2d 578.

In condemnation proceedings whether any necessity exists for taking particular property for purpose alleged in the petition is ultimately a judicial question on which the owner of the property is entitled to be heard.

But if as in this case the carrier pays no attention to the Section of the Constitution, appropriates the private property without paying or securing the compensation and makes no effort later to acquire it, as under Section 73.09 it can then by indirection accomplish what is forbidden to do directly and that is:

1. Take it without paying or securing compensation.

2. Deprive the owner of his property without due process of law.

3. Deprive him of his trial by a jury of 12 men because even if the owner elects to bring ejectment in Florida that is tried by a jury of 6 men.

4. Deprive him of his right to attorney's fee as the one who brings a condemnation suit in Florida has to pay the defendant a reasonable attorney's fee for the defense.

5. Deprive him of his right to any jury trial by requiring him to claim a vendor's lien.

Hillsboro County v. *Kensett*, 144 So. 393, where limitations or laches were attempted to be pleaded as a defense to vendor's lien claim for property taken for public use without payment, held that any such act would be unconstitutional as in opposition to this section of the

Constitution and which is probably one basis for the holding that private property cannot be acquired by adverse possession by a corporation with the right of eminent domain.

Sec. 12 of Florida Declaration of Rights:

No person shall be subject to be twice put in jeopardy for the same offense, or compelled in any criminal case to be a witness against himself, *or to be deprived of* life, liberty *or property* without due process of law, *nor shall private property be taken* without just compensation.

Rosenbaum v. *State Road Dept.*, 177 So. 220.

The provision of this section as to payment of just compensation for property taken is mandatory and applies to *every corporation* or individual appropriating the property of another.

Hillsboro County v. *Kensett*, 144 So. 393:

Mary Kensett in 1925 was the owner of certain land and in that year Hillsboro County entered upon it, threw up a grade and built a road across her land without purchase or condemnation. While nothing prevented her from bringing a suit she waited until something over five years later and then started her vendor's lien suit.

One of the objections to this action was, was it barred by Sec. 4665, C. G. S., which required a claim for land taken by a county for road purposes to be filed with the County Commissioners within a year after the taking. The court pointed out under the 8th headnote that such a statute was in conflict with Art. XVI, Sec. 29, of the State Constitution but that a demand would have to be made against the County for payment and refused before a suit started.

that the only bar to such a suit is by a lawful, statute of limitations *applying to the suit itself*, or by general principles of laches when the suit is equity.

Under the due process portion of the above section the Florida Supreme Court's construction of the section in *Spafford* v. *Brevard County*, 110 So. 451.

Due process of law demands that the owner of the land should have reasonable notice and opportunity to protect rights before appropriation is adjudged.

State ex rel. Moody v. *Baker*, 20 Fla. 616:

Nor does the act have to authorize the landowner the right to institute proceedings in case the company fails to do so.

Reference to Reported Opinions to Support the Judgments of the Federal Courts.

The case of *Florida Sou. Rlwy.* v. *Loring*, 51 Fed. 932, was cited by both the district and circuit courts of appeals (Loring brought ejectment), but that holding has since been nullified by the enactment of Sec. 73.05, F. S. A., which gives the carrier the right to enter private property without making any attempt to first acquire such right by purchase, condemnation or any proceeding and by the State Supreme Court's construction of the law and Constitution that the remedy of a person whose property has been taken in such manner is to go into equity to enforce a vendor's lien for the value of the property.

Furthermore even those who can acquire property by adverse possession have to put the owner and subsequent purchasers on notice by fencing and clearing the land and take other steps that show open and notorious possession and a few claimed markers, which it is denied exist, would not be a sufficient notice to base such a claim on even if

possession or title could be acquired in such manner by a corporation that has the right to enter regardless of the wishes of the owner.

As to the Cases Cited by the C. C. A.

Aside from the Florida Central case the Circuit Court of Appeals cited *S. A. L. R. R.* v. *A. C. L. R. R.* and which is controlled by an entirely different statute. That is not the case of taking private property but where two corporations with the right of eminent domain have a controversy over their conflicting claims.

That case points out that statute and also points out that the S. A. L. had admitted or agreed the extent of its conflicting claim and all the A. C. L. did was quiet its title to the land the S. A. L. had agreed A. C. L. had a better right to. See *S. A. L.* v. *A. C. L. R. R.*, 158 So. 459.

The petitioner has no quarrel with the cases cited under Section C of the opinion of the C. C. A. But she claims it has no right to prejudge her claim and deny her the right to prove in the state court and rebut the claims of the Railway that it could acquire title in this manner or that she was not entitled to a vendor's lien or that if adverse possession could be made an issue that it had done the things necessary to put her on notice when she purchased.

QUESTIONS PRESENTED.

FIRST QUESTION.

Can the Federal District Court Dispose of a Bona Fide Contested Claim by a Summary Proceeding in Bankruptcy on an Application for Leave to Sue?

Apparently the federal court acquired jurisdiction of the bankrupt in 1931 under Title 11, Sec. 202, and contin-

ued under that title until March 3rd, 1933, under 77B and on August 27th, 1935, 77B was superceded by Title 11, Sec. 205. But under none of these acts or the amendments thereof does the district court by implication have any jurisdiction to determine controversies between citizens of the same state just because one happens to be in bankruptcy. And such contests cannot be determined by the Federal Court by summary proceedings or otherwise.

There is considerable conflict between the various Circuit Courts of Appeal as well as in various states of the construction of the Federal Bankruptcy Act as to whether permission to sue a receiver is even necessary.

Donneaux v. *Fox,* 300 Fed. 800 (Fla.), says no permission to sue is necessary.

Field v. *Kansas City Refining Co.,* 296 Fed. 800, and 9 F. 2d 313, holds that if the contest is over the title to land occupied by railroad tracks, permission to sue is necessary.

C., R. I. & P. R. R. v. *Quatanna,* 120 F. 2d 226, 8th Circuit says that such suits cannot be brought without consent of the court.

Re C. E. I. R. R., 121 F. 2d 785, 7th Circuit:

It is better to obtain consent but it is not necessary, however it had given its implied approval by authorizing the receiver to defend the case.

Ohio Oil v. *Thompson,* 120 F. 2d 831:

This suit was originally brought in the State Court by the railroad and the defendants filed a counterclaim in the State Court. It was held the suit *should proceed* in the State Court.

In other words because the corporation became a bankrupt the jurisdiction of the Federal Court was not ex-

tended to determine controversies that would have otherwise been tried in the State Court.

In fact Sec. 205 of Title 11, expressly indicates that while the district court can enjoin suits, other than those arising out of the operation of its cars and busses, it has no jurisdiction of such suits if there was no jurisdiction otherwise and any suits that had been transferred under any such belief should be remanded to the State Court. This act could only be construed as an injunction against the Federal Court attempting to assume jurisdiction of such questions.

Gutersohn v. *R. C. & S. R. R. Co.*, 140 F. 2d 755, indicates that if a suit is commenced without permission the district court can enjoin its prosecution which would indicate that permission is necessary.

Hooper v. *M. O. P. R. R.*, 177 S. W. 2d 755, says consent must be obtained.

Snow v. *Thompson*, 178 S. W. 2d 796, says no consent is necessary to sue.

The petition for leave to sue (Record p. 3), in no way asked the court to inquire into the merits but only attached a copy of the proposed complaint for the purpose of showing what the cause of action was and with the intention of bringing that suit in the State Circuit Court for Martin County, Florida.

The trustees were residents of Florida and the debtor was a Florida corporation, the applicant was a Florida resident and the *res* was located in Martin County, Florida.

Buler v. *Schumacher*, 71 F. 2d 831, 296 U. S. 367:

Courts cannot determine by summary proceedings, disputed facts and controverted issues of law and claimant is entitled to a plenary suit. Also *May* v. *Hender-*

son, 268 U. S. 111; *Re Barnes*, 202 Fed. 883; *Re Roberts*, 16 Fed. Supp. 424; *Maxwell* v. *Engrebretzen*, 74 F. 2d 93.

In other words if there is no basis of federal jurisdiction and there is a *bona fide* contest then the applicant has the right to sue but the action must be brought in the State Court.

It might be pointed out that under the law as to carriers as construed by the Florida Supreme Court where a corporation with the right of eminent domain has unlawfully appropriated property and a suit in ejectment or vendor's lien foreclosure action started to enforce the payment, the carrier can always get a stay of such an action in the State Court, as will be pointed out under the 5th question.

However the rule is that such injunctions should not be continued any longer than is necessary.

First Trust v. *Baylor*, 1 F. 2d 24:

The injunction against the enforcement of liens should not be perpetual and in case of long delay, restraining order should be modified to permit foreclosure. See *Re 9 North Church St.*, 82 F. 2d 186.

This would be especially true in Florida because Sec. 4 of the Constitution assures its citizens its courts will always be open to hear their demands and justice shall be administered without *denial*, sale or *delay*.

It would therefore seem a grave question whether a federal district court sitting in Florida could issue an order that denies such constitutional guarantees.

SECOND AND THIRD QUESTIONS.

Can a Federal District Court Claim That Because a Corporation That Is Organized under the Laws of the State in Which That Court Sits and Is Adjudged a Bankrupt by That Court, Extend Its Jurisdiction to Hear and Determine Matters of Law and Fact That Except of the Bankruptcy Proceedings Are Within the Sole Jurisdiction of the State Circuit Court and the Venue Is in the County Where the Land in Question Is Situated?

While the Florida law is silent on the remedy of a private person whose land has been appropriated without payment; by a corporation with the right of eminent domain, the court has pointed out and consistently held that such an owner can waive the tortious taking and elect to declare a vendor's lien for the value of the property so taken and go into equity and foreclose this lien. *Florida Central R. R.* v. *Bell,* 31 So. 259; *Hillsboro County* v. *Kensett,* 144 So. 393; *State Road Dept.* v. *Rosenbaum,* 177 So. 220, and cases therein cited.

In Florida a vendor's lien is good for 20 years when there is any applicable statute of limitations and it has not been tolled by the court having possession of the property.

The further rule in Florida is, *Hill* v. *Gordon,* 45 Fed. 276, appeal dismissed 149 U. S. 775:

> "A lien cannot be divested by adverse holding for the statutory period in Florida, as holders of the title do not hold adversely but hold subject."

As the court pointed out in that case where a judgment lien was good for twenty years the holder was not guilty of laches because he did not seek to enforce his lien sooner, as long as he sued within the 20 year period.

Absent any tolling of the statute by the court forbidding suits and keeping this injunction in force for fifteen years, the time had not expired when she asked permission to enforce the lien.

Due to the conflict of decisions as to whether any leave to sue was necessary and in view of the State Constitution provision that the state court would always be open, the application was more one of courtesy to the federal court but the reaction appeared to be that it was an outrage to even suggest the debtor that had been under the court's wing for some 15 years should be required to defend a claim for payment of land it had taken and not paid for.

Of course under the law of Florida laches can be pleaded as defense but must be proved and the defendant show in what manner it suffered injury by the delay or has been disenabled to defend by the long delay.

Fla. Mtg. Invest. Co. v. *Finlayson,* 91 Fed. 13, certiorari denied 174 U. S. 801:

Equity follows the law as to limitations; and where the life of a judgment is 20 years under the statute, the holder of such a judgment *will not be held guilty of laches* that will authorize a court of equity to set aside a sale of land thereunder and made within such time.

Cone Bros. v. *Moore,* 193 So. 288:

Laches is primarily a *question of fact* to be determined by the circumstances, surroundings and conditions in each case.

Sarasota v. *Dixon,* 1 So. 2d 198:

Laches and statutes of limitations do not run as respects possession or *right of possession* of property which is in the court through custody of its receivers.

Holliday v. *Wade*, 117 F. 2d 154:

Equity will generally apply to legal claims the legal limitations for time of action thereon.

P. W. Wilken v. *Grove*, 19 So. 2d 834:

The test of laches is whether delay has resulted in injury, embarrassment or disadvantage to any person, particularly the defendant.

Shaylor v. *Cloud*, 57 So. 666, 1914A Ann. Cas. 277.

Sonderberg v. *Davis*, 159 So. 23:

A vendor's lien is good for twenty years and is similar to a purchase money mortgage.

Even had the statute not been suspended by the court taking possession of this property and issuing its stay order still the twenty years period had not expired when leave was sought to enforce the lien. But if leave to sue had been granted that would not have been a defense in the State Court and furthermore even had the district court any jurisdiction to determine this question the judgment was not responsive. Apparently the court contorted the application to enforce the vendor's lien as one to sue in ejectment because adverse possession would not run against a lien holder and even then, the seven year statute of limitations had not run against ejectment because the Railway was adjudged a bankrupt in 1931 and only five years had run before the statute was tolled by the court forbidding suits, even if a corporation with the right of eminent domain could acquire the property of others in such manner.

In any event the district court had no jurisdiction to determine the matter and much less without proof of any injury. A secured creditor does not have to file any claims in a bankruptcy proceeding, he can sit by and do nothing

and wait for the bankrupt to emerge, lawful liens are not divested in such proceedings but only personal liability.

If the carrier wanted to disaffirm its holding it could give back the land and notify her, if it wanted to adjust her lien it could make some proposal, but if it wanted to perfect its title all it had to do was proceed under Sec. 73.09, F. S. A., but failing to make any attempt her only remedy was to ask leave to foreclose it.

FOURTH QUESTION.

If the District Court Was Wrong in Assuming Jurisdiction and in the Rendition of Its Judgments, Was the Circuit Court of Appeals in Error in Not Only Affirming the Lower Court But Also Making Added Findings of Fact That the Land Was in Adverse Possession of the Railway When the Land Company Executed and Delivered Its Contract and Deed?

The petitioner's contention is and in support thereof adopts the argument under the second question, that if the district court had no jurisdiction of the merits of the case or the parties or the subject matter of the controversy and there was no diversity of citizenship between the parties and no federal question involved or any basis of federal jurisdiction and there was nothing in the record that would tend to show any reason why a plenary suit should not be brought in the State Court, then the Circuit Court of Appeals should have reversed the case, assessed the appellee for padding the record and remanded it to the district court with instructions to grant the application to sue.

That was the only issue involved, but it not only adopts and affirms the lower court's findings of fact, obtained without any evidence to support them, but even finds itself, that the Railway Company was in open, hostile

and notorious possession of the strip of land in 1919 when the Land Company executed its contract and in 1921 when it executed and delivered its deed. How such findings of fact can be determined without any evidence or anything in the record to support them, even if either court had any jurisdiction to determine such questions, were due process of law afforded, the issue developed and each party were allowed their day in court. The Railway claimed it had maintained its poles in Lot 2 or on the east side of its track but that was immaterial because even if maintaining a pole line constitutes anything but adverse possession of the land upon which the poles stand and such corporations also have the right of eminent domain, still the land in question is on the west side of the track in Lot 3 of the Grant.

But in this case the district court sitting in Jacksonville, Florida, 265 miles away can determine without any evidence that the Railway in 1919 was in adverse possession of a strip of land a mile and a half long in 1919 and 1921 and the Circuit Court of Appeals in New Orleans can also make the same finding and therefore hold the deed was void, presents a novel method of trying the title to real property. The allegations were that the Railway entered this land without lawful claim of right in 1926 and took possession of it.

Under any theory of due process of law the Railway was entitled to deny such allegations and raise an issue and both parties allowed a trial in the State Court, or if the Railway elected to claim the benefits of Sec. 73.09, F. S. A., it could get its stay and condemn this land but by the method of procedure followed in this case the applicant's title is determined in an *ex parte* proceeding on a simple motion to relax a long continued and unreasonable stay order.

The Railway Company sought and obtained the stay order and the district court granted it and under any theory of estoppel the Railway was estopped to suggest laches and the District Court estopped to impute laches for failing to do what it had forbidden, and which was not applicable. But the gist of the appellate court's judgment in sustaining the lower court was on such unsupported finding of fact and which neither court had any jurisdiction to determine.

FIFTH QUESTION.

If the Federal and State Constitutions Forbid Taking Private Property for Public Use Without Payment, Can a Corporation with the Right of Eminent Domain Proceed by Indirection and Acquire Such Property by Any Other Method?

The limitations as to taking private property for public use without payment, applies to the Federal government but where the State Constitution contains a similar restriction it applies to those claiming that power through the state and then the Federal Court would have to apply the state court's construction of that restriction in any action that was properly before such court.

Section 1 of the Florida Declaration of Rights provides that among the *unalienable rights* of its citizens is the right of acquiring, possessing and protecting property and to equal protection of the laws.

Section 12 of the same Declaration is similar to the same provision in the Federal Constitution and forbids taking private property for public use without payment. The method set out for taking such property for such use is under Chapter 73.00, F. S. A.

In *Williams* v. *Parker,* 188 U. S. 491, this court held in construing the Massachussetts Constitution that Massachusetts

> "May authorize the taking of private property for public use, prior to any payment or even before the amount of payment has been determined. That was a case in which the City of Boston was enforcing building restrictions and the socalled inexhaustible taxing power to pay any judgment was present. However, when you deal with bankrupt public service corporations another question is presented."

But as that opinion stated, citing *Sweet* v. *Retchel,* 159 U. S. 380; provided, adequate provision is made for payment of any resulting judgment.

It is not here contended that any Federal Court was required to or had any jurisdiction to construe this question, had the application to sue been granted the case would have proceeded under Chapter 73, F. S. A., in the state court if the Railway wanted to get a stay in the vendor's lien action and proceed under Section 73.09 which is as follows:

In any case where the petitioner *shall not have acquired title* to any lands the petitioner is using, or if at any time after attempt to acquire title by condemnation proceedings or otherwise, it shall be found that the titles so acquired are defective, the petitioner may proceed under this chapter to acquire or perfect such title, *or acquire any outstanding right, title* or interest in and to such property, provided, however that the compensation to be allowed the defendants shall be just compensation for the property or right, title or interest then taken as of the date of the appropriation.

Section 73.01 sets out the form of action and method to be pursued, Section 73.10 provides for a trial affording

due process of law to develop the issues, 73.11 provides for a 12 man jury, and 73.12 for a conditional judgment, no title to pass until it is paid.

The court will note that ample provision is made for the protection of the owner if the condemnor first seeks to acquire title before it enters. But if as in this case it enters and makes no attempt to acquire title where in 73.09 is there any kind of provision for payment to the owner and does this also afford equal protection of the law?

Such a statute invites what would otherwise be an unlawful trespass, why bother to condemn and make yourself liable to obtain a conditional judgment, when it can simply enter without making any attempt and avoid any expense of litigation. Once in possession, the court will not disturb the possession no matter how it was obtained if that would disrupt the public service.

All the owner can do in that case is to protest, the statute made no provision for payment nor does it inflict any penalty for such abuse of power delegated. All it has to do is enter as it did in this case, it could not be liable for any greater damage than if it had condemned it in the first place, so in the absence of any statute for the protection of the owner the Florida court first developed the action of ejectment.

J. T. & K. W. R. R. v. *Adams*, 9 So. 2.

Ejectment lies against a railroad to recover property taken without authority.

But it later developed the vendor's lien action as being a more adequate remedy and under the theory that equity would see no wrong without a right and would raise an obligation to pay for what was taken.

Fla. So. Rlwy. v. *Hill,* 23 So. 566, and still approves this procedure, see *Rosenbaum* v. *State Road Dept.,* 177 So. 220, and cases therein cited.

But as stated in *J. T. & K. W. R. R.* v. *Adams,* 10 So. 465, 14 L. R. A. 533, whether the owner brings ejectment or elects to claim a vendor's lien the carrier can always get a stay in those suits and then proceed to do what it should have originally done and proceed under 73.09 or it can allow the vendor's action to proceed and after final decree get a stay of execution if the sale of its track would disrupt the service it is required under its charter to provide.

So under this law, no provision is made for payment of compensation where the carrier simply appropriates the land nor does it afford equal protection of the law if there are no limitations running against the carrier within which it can seek to proceed under Section 73.09.

If there are no limitations running against it there can be none running in its favor, absent any prohibition as to taking private property without payment. Under any theory of equal protection of the law you can't pass acts that restrict certain classes and not make it apply in equal force to others.

But even in cases of private parties who do not have the right of eminent domain, it takes seven years open, hostile, notorious and continued possession to divest the owner's title and if in the meantime the court takes possession of the property and stays suits against its receivers that tolls the statute. *Sarasota* v. *Dixon, supra.*

The complaint alleged the land was appropriated in 1926 and in 1931 the court took possession and stayed suits, and the undissolved stay order was what caused the applicant to appear in the federal court. The federal court had continued an uninterrupted possession through its receivers since 1931 and yet it found the applicant was

guilty of laches regardless of the fact that under the Florida law laches do not run in such cases and that the Railway had acquired adverse possession, regardless of the fact the seven years statute had been tolled and the court had forbidden her to enforce her claim without its consent.

But it is contended that not only did the federal court have no jurisdiction to determine this question but its judgment was not responsive and that laches in Florida are a question of fact and must be pleaded and proved. But you can't accomplish by indirection what the Constitution directly forbids so somewhere along the line the owner has to be compensated.

Rogers v. *Toccoa Power Co.*, 131 S. E. 517, 44 A. L. R. 534:

> "But compensation must be paid to afford due process of law."

N. P. R. R. Co. v. *Concannon*, 239 U. S. 382, 50 A. L. R. 304:

A corporation with the power of eminent domain cannot acquire property by adverse possession. See *Collinsville Coal* v. *B. & O. R. R.*, 65 Atl. 669.

The district judge when a member of the Supreme Court of Florida wrote the lengthy opinion in *S. A. L. R. R.* v. *Spec. R. & D. Dist.*, 108 So. 689, 46 A. L. R. 870.

In that case the public, through the Road and Bridge District that had the power of eminent domain, claimed to have acquired title to part of the carrier's right of way by adverse user. The court made a thorough investigation, cited federal and state cases from various parts of the country and came to the conclusion that adverse possession could not be obtained by or against one that had the right of eminent domain, had exercised it and

lawfully acquired its title. It cited two cases where adverse user by one without the right of eminent domain had fenced and acquired title against the carrier but refused to accept such decisions and held that the use was only permissive.

Then let us examine *Palmetto* v. *Katch*, 98 So. 352:

The Railway was claiming under a dedication, although there was none, and as the Supreme Court of Florida pointed out in the Palmetto case, that where there was a dedication, *that is not a deed*, conveys no title, but is simply an offer of use and if not accepted can be revoked by conveying the property at any time before the acceptance. So the real question of fact that had to be determined was, had the Railway accepted the offer of use, if for the sake of argument the reservation on the Land Company's plat could be construed to be a dedication.

Let us then examine *Miami* v. *F. E. C. Rlwy.*, 84 So. 726, in which case the Florida Supreme Court set out what steps had to be taken to show an acceptance of a dedication.

In that case the Railway had filed a plat and designated a certain area as a "park." The City brought ejectment, the issue was not determined in a summary manner, all parties had their day in court and the defense of the Railway was there had been no dedication and even if marking the area as a part, could be considered a dedication, there had been no acceptance. The Court sustained this defense and pointed out the steps required to put the owner on notice, his offer of use had been accepted.

Of course the case before the court is even stronger because in that case private property was not being taken for public use and the City had its day in court but

where is there any testimony in this record of what acts of acceptance had been taken before the Land Company sold this land, gave its deed and so revoked the dedication, even if there was one.

Assume the Railway had been bankrupt at that time and the City sought leave to bring ejectment from the federal court, there still would have been no basis for federal jurisdiction to determine the question and even had the Railway *pleaded* a perfect defense and set out all the absence of acts necessary to show an acceptance, still the City would have been entitled to rebut those claims, and require the Railway to prove them and on its part show it had accepted the offer of use by competent sworn evidence. The Federal court could hardly determine the right or title to that property in what in fact is an *ex parte* proceeding simply based on the allegations in the pleadings.

Just how a federal judge sitting in Jacksonville, Florida, some 265 miles distant could determine whether the Railway had done the things to show an acceptance in 1919 or 1921 and how the Circuit Court of Appeals in New Orleans can reach the same conclusion or find that the land was in adverse possession of the Railway Company in 1919 or 1921 when the deed was executed and delivered by the Land Company, with no testimony of any kind in the record, even if it had jurisdiction to determine this question, this court may be able to answer.

Certainly placing telephone and telegraph poles on Lot 2 of the Grant by other corporations with the right of eminent domain would not show any claim of possession to Lot 3 and the latter lot was the one in contest. Nor would adverse possession by the A. T. & T. even if it could acquire private property in that manner extend such title to the Railway Company. However those are ques-

tions for the State Court to determine by appropriate procedure.

SIXTH QUESTION.

Was the Respondent Guilty of Padding the Record on Appeal?

The answer to this question would be limited to the extent of the jurisdiction of the federal court to inquire into the matter.

The petitioner's contention is, that jurisdiction simply extends to ascertaining if the claim is *bona fide* and there is an actual contest of issues that must be determined in some court. It does not even extend to determining if the carrier can pay the judgment if rendered because it can always get a stay from the state court if its enforcement would disrupt the public service.

Re Makin, 28 F. 2d 417:

> "Where a substantial lien was claimed on land the trustee asserted title to, the bankruptcy court was *without summary* jurisdiction, and *where there is no diversity* of citizenship *the plenary suit must* be *brought in the State Court.*"

The only question involved on the appeal, was if the district court had summary jurisdiction to determine a *bona fide* contest between residents of the same state and if the objections of the Railway showed any valid reason why the injunction to sue should not be relaxed.

The burden was on the appellant to get up the record and only include such parts as were necessary to determine those questions, if she failed to include sufficient of the record to support the questions raised that would have been her loss. In observation of Rule 75 and the rules of the Fifth Circuit, she filed her directions as to making up the record (Record p. 41). The appellees filed no cross assign-

ments of errors, but then came in and filed directions to include a great mass of irrelevant maps, plats and claims of common creditors. Most of which exhibits would not have been competent evidence in the State Court and certainly had no place in this record, other than to try and get before the court in a summary proceeding for leave to sue, matter that might support a judgment in a plenary suit.

That regardless of the appellant's objections to the inclusion of this matter, the district court on page 81 of the record not only approved but ordered this be included in the record; "In order this *evidence* considered by the court in making its finding."

This so called evidence, was according to the law, not competent for the district court to examine. The Railway filed its objections to allowing the petitioner leave to sue, that showed there was an existing *bona fide* contest that had not expired by any statute of limitations.

It was not a colorable claim or fraudulent or made by the bankrupt or anyone in connection with it. Furthermore federal courts are restricted against the enjoining of state laws and when the State Constitution assured the petitioner its courts would always be open to hear her claim without denial or delay that also had to be considered and what this stay order in effect produced was the denial of a right guaranteed by the State Constitution.

But the contention is that because the district court exceeded its jurisdiction and examined into the merits of the controversy, was no reason to sustain the appellees' motion to include all this irrelevant matter in the record in order to sustain findings of fact it had no jurisdiction to make.

The Railway had never disaffirmed its holding of this land and as a secured creditor for whom no adjustment was offered she was not required to file any claim or objections because no adjustment had been offered her.

6 Amer. Jur. 583; 79 A. L. R. 389; 94 A. L. R. 472:

"A secured creditor if he chose may stay out of the bankruptcy proceedings entirely and look to the security alone for the payment of his debt."

Re Wakley, 50 F. 2d 889, 75 A. L. R. 1521:

Instead of asking permission to sue the receiver, in this case the lien holder asked the bankruptcy court to order payments be made on his claim. The objection was the claim came too late. But the district court was reversed as a secured creditor did not have to file his claim and right to sue was suspended when the court took possession and the applicant was *not guilty of laches.*

Re Lane Lumber Co., 217 Fed. 550:

"An unrecorded vendor's lien *is superior* to anyone claiming under the purchaser except an incumbrancer or purchaser in good faith and is good against a trustee in bankruptcy."

So there was no question about the validity of the claim or any jurisdiction to inquire into it and the questions of law and fact were for the state court to determine. What difference could it make how many common creditors filed claims, these have to be filed in order they may be aggregated and any surplus divided among them *pro rata.*

In what manner would a private map made and kept in the office of the carrier put anyone on notice that the carrier claimed possession of land by that map? The recording acts forbid such type of claims.

The purpose and intent of Rule 75 was to prevent adding to the burden of those taking appeals by padding the record as well as to save the time of the court and exhausting its storage space by sending up a lot of irrelevant matter that has nothing to do with the issues involved.

The rule announced by this court in *Barber* v. *Standard Asphalt*, 275 U. S. 372, was probably one basis for Rule 75

and its violation calls for the supervisory power of this court.

Wherefore, petitioner contends, certiorari should be granted for the following reasons:

1. To reconcile the various Federal and State construction of the bankruptcy act as to whether or not permission to sue a receiver is necessary in cases not specifically exempted.

2. To state the limits of the jurisdiction of a bankruptcy court and if it has jurisdiction to determine in a summary proceeding contested questions of law and fact, when it had no jurisdiction of the subject matter.

3. That if due process of law was afforded and if á Florida railway corporation with the right of eminent domain can obtain adverse possession of the title to private property.

4. If an applicant for leave to sue to enforce a vendor's lien can have her application denied and her application be construed in a summary proceeding to ask leave to sue in ejectment.

5. To construe Rule 75 of the District Courts and hold and declare the appellees were guilty of padding the record on the appeal to the Circuit Court of Appeals.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1946.

J. K. DUNSCOMBE,
Petitioner,
vs.
SCOTT M. LOFTIN, as Trustee, et als.,
Respondents.
No. 224.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

There are two opinions. The District Court filed its order (Tr. 30) and a Memorandum (Tr. 31 and 32) which has not been printed in the Federal Reporter series. The opinion of the Circuit Court of Appeals (Tr. 89-97) was rendered April 12, 1946, and is reported in 154 F. (2d) 963.

JURISDICTION.

The judgment, Circuit Court of Appeals, was entered April 12, 1946 (Tr. 97-98), and its order denying petition for rehearing was entered May 11, 1946 (Tr. 102). The petition for writ of certiorari was docketed June 22, 1946. On page 7 of the petition for writ of certiorari petitioner states:

> "Jurisdiction to review a judgment of the Circuit Court of appeals is vested in this court under Title 11, Section 347 (c) . . . "

but the citation is erroneous and was evidently intended for Title 28, Section 347 (a), U. S. Code 1941.

STATEMENT OF THE CASE.

We cannot agree with petitioner's Statement of Matters Involved, on pages 2 to 7 of the petition for certiorari, nor with her other statements of the case at other places in her petition and in her brief. Solely for brevity we refer to and adopt as a correct statement of the case the opinion of the Circuit Court of Appeals (Tr. 89-97 and 154 F. (2d) 963). Hereafter in this brief we shall occasionally restate some of the facts to correct erroneous or inadequate summary of them made in the petition for certiorari and brief in support thereof.

ASSIGNMENTS OF ERROR.

The brief in support of petition for writ of certiorari does not contain any assignments of error, but hereinafter in replying to the petition and brief we will argue the "Questions Presented" by petitioner as stated in her petition and brief.

THE ERRORS IN AND INSUFFICIENCY OF THE PETITION FOR CERTIORARI AND THE SUPPORTING BRIEF.

Counsel for respondent Trustees of the property of Florida East Coast Railway Company, Debtor, assert that the petition for certiorari should be dismissed, not only because it fails to state proper grounds for relief but because it fails to comply with the requirements of Rule 38, par. 2, of Revised Rules of this Court, and petitioner's supporting brief violates Rule 27, par. 1 (c), (d), (e) and (f) of the Revised Rules. The "Statement of Matters Involved" and the "Basis of Jurisdiction" in the petition for certiorari contain numerous errors and omissions in summarizing the record, as well as vague and frequently inaccurate summaries or references to law and statutes. The "Questions Involved" and the "Reasons for Granting the Writ" in the petition repeat some of the erroneous statements of fact and add new errors in statements of law in summarizing decisions and statutes, and even citations to statutes. Petitioner's supporting brief does

not conform in many particulars to Rule 27 of the Revised Rules of this Court. We shall discuss these errors and insufficiencies as they appear in order in the petition and brief.

A. REPLY TO "STATEMENT OF MATTERS INVOLVED" IN THE PETITION.

The "Statement of Matters Involved" in the petition for certiorari is a rambling and vague tale of wrongs sustained by the petitioner, J. K. Dunscombe, in her journey through the Courts below. Tested by the actual record and established law little remains other than smooth worn words and phrases, wholly insufficient to warrant any relief. Technically speaking the Debtor has not been a "bankrupt railroad" against which the District Court refused to relax its fifteen year stay of suits.

General Receivers in Equity were appointed for the property of the Debtor on August 31, 1931, on the suit of a common creditor, by the District Court (see opinion in *Findlay v. F.E.C. Ry. Co.*, 68 F. (2d) 540), and in the same order suits were stayed and all creditors required to present their claims within six months (Tr. 69), later extended to March 1, 1932 (Tr. 71, and opinion Circuit Court below, Tr. 92-93). On February 1, 1941 a creditor of the Debtor successfully commenced reorganization proceedings under Section 77 of the Bankruptcy Act (opinions in *F.E.C. Ry. Co. Trustees' Eq. Trust Certfs.* Finance Docket 13485, Vol. 249 I.C.C. 361, and *Peavy-Wilson Lumber Co., Inc. v. Loftin, et al.*, 131 F. (2d) 579). Parenthetically, the order approving petition in the reorganization proceeding and appointing temporary Receivers did stay suits, but an order of June 6, 1941, in the reorganization proceedings, did limit to October 1, 1941 the time for filing claims (Tr. 43-47). The petitioner, J. K. Dunscombe failed to file claims in either the Receivership Proceedings or the Reorganization Proceedings within the times fixed by the orders therein (Tr. 93), and "She then waited 15 years for dissolution of the stay order" (Pet. for Cert. 4). Nowhere in the record herein has petitioner shown that she was not bound by the order (Tr. 70) fixing March 1,

1932 as limit for filing claims in the Receivership Proceedings, and the order (Tr. 43) entered in the Reorganization Proceedings fixing October 1, 1941 as limit for filing claims. There is a general allegation in the second paragraph of the petition for leave to sue (Tr. 1) that petitioner is not barred by the passage of time. But petitioner has been under no disability since the commencement of the Receivership proceedings. The stay orders in the Receivership and Reorganization Proceedings did not prevent her from filing her claim in either proceeding, as required by the orders in each proceeding fixing the time for filing claims therein. In each proceeding, Receivership as well as Reorganization, the District Court had exclusive jurisdiction of all of the Railway Company's property. The validity and binding effect of orders fixing time for filing claims in general receiverships of railroads has been established for over fifty years. See *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672, and *Oklahoma v. Texas*, 266 U. S. 298, 69 L. Ed. 296. Section 77 of the National Bankruptcy Act, as amended, has been repeatedly held valid, and in *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. Ed. 876, "A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession." See also Section 205, Title 11, U. S. Code 1941 "*The Court . . . shall . . . have exclusive jurisdiction of the debtor and its property*", and see Section 205 (c) (7) and (8) of Title 11 as to fixing time for filing claims. The nearest to an excuse or reason for petitioner waiting for fifteen years to assert her claim is her contention to the effect that her claim, being one for value of land taken by a Florida corporation having the power of eminent domain, could never be barred under the Federal and Florida Constitutions. Such is not the law either of Florida or, as announced by this Court, in respect to the Federal Constitution. The Supreme Court of Florida has expressly held that a claim for compensation for land taken for public purposes can be "lost or abandoned", and has also held a corporation having the power of eminent domain can nevertheless acquire title by adverse possession. See *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, and *S.A.L. Ry. v. A.C.L.R.R. Co.*, 117 Fla. 810, 158 So. 459.

These two decisions are in accordance with the weight of authority, and only two states support the contrary rule asserted by petitioner. See *Vol. 2, Nichols on Eminent Domain (2nd Edition)* Section 344, pp. 959-960; *Lewis on Eminent Domain (Third Edition)*, Vol. 2, page 1714. This Court, as early as 1898, held that:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute."
>
> *Pierce v. Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316.

The excuse or reason asigned by petitioner for waiting fifteen years and not filing or presenting her claim within the times respectively limited in the Receivership and in the Reorganization proceedings is wholly without merit and was so held both by the District Court and the Circuit Court of Appeals in their respective opinions herein (Tr. 31 and 89-97).

A correct summary of petitioner's claim, as stated in her petition for leave to sue (and not as attempted to be amended or elaborated in the petition for certiorari), appears in the first three paragraphs of the opinion of the Circuit Court of Appeals (Tr. 89-91). This opinion now also appears in 154 F. (2d) 963.

The petition for leave to sue did not pray that petitioner be permitted to "enforce her vendor's lien in the State Circuit Court for Martin County, Florida" (Pet. for Cert. p. 3). To the contrary, "Petitioner prays that the Court allow and direct said claim to be adjudicated in such Court of competent jurisdiction as it may appear most appropriate." (Tr. 2).

At the foot of page 3 of the petition for certiorari petitioner places in quotations the following matter as being included in the final decree of partition of December 17, 1901:

> "that the Railway was entitled to land it then had its single track upon and used for the operation of the railroad."

This quotation is erroneous. Nowhere in the final decree in the partition suit did the court use the expression "single track". Although the Florida East Coast Railway right of way was casually mentioned several times in such final decree, the main paragraph of the 1901 decree relating to the Florida East Coast Railway is exactly as quoted in the Report of the Trustees and shown on page 14 of the transcript. In the December 17, 1901 final decree in the partition suit of Annabelle Robinson of 1891-1901, and as found by the District Court below, the Railway was decreed to be "entitled to its right of way . . . to the extent in width as the same is now" (then) "used, occupied, laid out, surveyed, and operated" through the Myles or Hanson Grant (Tr. 14). As found by the Circuit Court of Appeals: "It appears from the report of the commissioners, their plat of the lands, and the partition decree of December 17, 1901, that not only did the railroad run over the right of way in question but the commissioners in allotting lands to the predecessors in title of Plaintiff made the railroad right of way a boundary line of lots 2 and 3. The commissioners did not allot the lands within the right of way to Plaintiff's predecessors in title, but on the contrary recognized the rights of the Railway therein, as did the Court in its final decree . . ." (Tr. 94-95). In other words, the very instruments referred to in the petition for leave to sue contradicted petitioner's claim of title and lien. The Circuit Court of Appeals so expressly held in the next to last paragraph of its opinion (Tr. 97).

At pages 3 and 4 of the petition for certiorari an attempt is made to construe the partition commissioners' report, their plat of 1901, and the Land Company's plat of 1913, each as not plainly recognizing the Railway Company's 100-foot right of way. However, this report and these two plats, copies of which were attached by petitioner to her petition for leave to sue (Tr. 9-10), speak for themselves.

We believe that this Court will construe them against the Petitioner, as did the two courts below.

The District Court (Tr. 31) expressly found from the evidence that "Since 1915 or earlier, its" (Debtor's) "possession of a 100-foot right-of-way has been evidenced on the ground by the presence of telephone and telegraph poles and right-of-way monument posts along the easterly and westerly sides of the 100-foot right-of-way." Both Courts held that the Land Company was out of possession in 1922 and its deed of that year to petitioner's husband was void under the Florida law (Tr. 31 and 96). The Circuit Court of Appeals also expressly found from the partition suit papers referred to in the petition for leave to sue that the Land Company "having obtained no title to the right of way" (by the partition decree) "could convey none to the husband of Appellant" (Tr. 96). These findings, supported by the portion of the record made by the petitioner, sufficiently refute the contentions of her title and want of notice of the Railway's claim of title made on pages 4 and 7 of the petition for certiorari.

Whatever may have been the uncommunicated understanding of petitioner and her counsel as to what would or could be determined at the Jacksonville hearing (Pet. for Cert. p. 5), there is nothing in the record to support any contention that the District Court would and did not fully hear on the merits the petition for leave to sue. "The Court, after due notice, having heard the evidence of the parties, and the argument of their counsel . . . said petition for leave to sue is denied." (Tr. 30). The Memorandum of the District Court (Tr. 31) shows conclusively that the hearing was on the merits. As shown hereinabove, the District Court had and was required by Section 77 of the Bankruptcy Act (Sec. 205a Title 11, U. S. Code) to exercise "exclusive jurisdiction of the debtor's property".

In our brief for the respondent Railway Trustees before the Circuit Court of Appeals, we stated—and we now state again:

> "Counsel for the Trustees believe that counsel for Petitioner will not deny that at the same hearing the judge of the Court below not only asked counsel for Petitioner whether he had anything to offer, but whether counsel for Petitioner denied the existence of the eighteen right-of-way monuments. At the hearing counsel for Petitioner did not, in fact, offer any evidence other than the exhibits attached to his proposed Bill, and in respect to the right-of-way monuments only suggested to the Court that they were small and might not constitute notice of claim, and might not actually be seen by any intending purchasers of lands in the Hanson Grant. No complaint was made in the petition for rehearing (Tr. 32-36) either as to the exhibits considered by the Court below, or as to any want of opportunity to offer testimony or evidence. Other than the general claim —(that the procedure of the Court below did not afford Petitioner due process of law)—in the First Point of 'Appellant's Statement of Points' (Tr. 39-40) there is nothing in the record showing any objections of Petitioner to any of the evidence considered by the Court below, nor any showing of lack of opportunity given Petitioner or that Petitioner desired to introduce other or further evidence."

At the argument before the Circuit Court of Appeals respondents stated, without contradiction from petitioner, that at the hearing by the District Court (a) all parties understood that it was on the merits; (b) that the District Judge stated he would consider the case just as if he were hearing the same in open court in the main court room; and (c) that the District Judge asked the petitioner's counsel if he had any other testimony or evidence he desired to produce, and petitioner's counsel, with the exception of his comment regarding the size of the monuments as above stated, did not directly or indirectly object to the procedure of the District Court or suggest to the Court that he had any other testimony or evidence to submit, or even that he needed time to attempt to procure the same. The Memorandum of the District Court (Tr. 31) clearly shows that the Court not only determined from the face of the petition that no meritorious claim was presented, but also went further and reached the same conclusion from the evidence submitted at the hearing. Labelling the hearing by the

District Court a "summary proceeding" does not make it one. The record shows otherwise (Tr. 30). The petition for rehearing in the District Court (Tr. 32-36) did not complain or assert that the hearing was a summary one—that assertion was first made in the "Second Point" of Appellant's Statement of Points (Tr. 39-40), but, as shown, is wholly unsupported by the record.

As we interpret them, the second and third paragraphs of page 5 of the petition for certiorari are chiefly complaints that the Trustees performed their plain duty by advising the District Court as to points of law, the facts involved, and producing the evidence to prove them at a hearing by the District Court of a claim for an equitable lien against the property of the Debtor which was then "in the exclusive jurisdiction" of the District Court.

The District Court held that petitioner "has no enforceable cause of action against Florida East Coast Railway or its Trustees (Order, Tr. 30). Its reasons in its Memorandum (Tr. 31-32) were not so limited as summarized at pages 5 and 6 of the petition for certiorari. The District Court held:

(a) That the final decree in 1901 in the partition suit determined that the Railway had a right of way to the extent in width as then occupied, laid out and surveyed;

(b) That since 1915, or earlier, the width as used was 100 feet;

(c) That petitioner's predecessor in title was not in possession in 1922 when petitioner obtained a deed;

(d) That petitioner took title with actual notice of the Railway's possession and claim of title;

(e) That the Railway acquired title by adverse possession in addition to title obtained in the 1901 partition final decree; and

(f) That petitioner's claims were barred by laches, and petitioner's claims were barred by the orders fixing time for filing claims in the receivership and reorganization proceedings.

It will be noted that any one of the six grounds for judgment is fatal to petitioner's claims. The Circuit Court of Appeals (opinion, Tr. 89) recognized each of these six grounds and also held that the petition for leave to sue and exhibits to same in themselves showed "Plaintiff's case was without merit."

The last paragraph on page 7 of the Statement of Matters Involved is especially replete with errors of fact and law. The District Court did have "exclusive non-delegable jurisdiction" of the Debtor's property and all claims against the same asserted therein. The hearing by the District Court was not "summary". A corporation having the power of eminent domain can, in Florida, acquire land by adverse possession. There was nothing indefinite about the orders in the Receivership and Reorganization proceedings requiring claims to be filed, and the Railway Company, its Receivers, and later Trustees, were under no moral, much less legal, duty to notify petitioner of any disaffirmance of holding the land (as asserted by petitioner), because title thereto had been lawfully fully acquired by the Railway Company under the partition decree of 1901 and subsequent actual user and possession of the full 100-foot right of way long prior to 1922 when petitioner acquired title to the abutting lands only. (Tr. 94-96).

B. REPLY TO "BASIS OF JURISDICTION" IN THE PETITION.

While respondents concede the jurisdiction of this Court to grant a writ of certiorari as prayed, respondents contend that it should not be granted for the many reasons stated elsewhere in this brief. The statutes cited by petitioner are either erroneously cited or are inapplicable. Section

347 (a), Title 28, U. S. Code 1941, is the correct citation. Section 377, Title 28, U. S. Code (cited by petitioner as "Section 262 of the Judicial Code") is not applicable because of the plain provisions of Section 347 (a) and the prohibitions in Section 347 (c), each of Title 28, U. S. Code. Petitioner's Basis of Jurisdiction is further defective in its failure to state "the date of the judgment or decree sought to be reviewed and the date upon which the application for appeal" (certiorari) "is presented" as is plainly required by the reference in Rule 38, par. 2 to Rule 12, par. 1. The missing dates are:

February 22, 1945, order of District Court denying petition for leave to sue. (Tr. 30).

March 16, 1945, order of District Court denying petition for rehearing. (Tr. 37).

April 12, 1946, judgment of Circuit Court of Appeals affirming District Court (Tr. 97).

May 11, 1946, order denying rehearing (Tr. 102).

June 22, 1946, date of filing petition for certiorari.

We are unable to agree with petitioner that the District Court and Circuit Court of Appeal did not have jurisdiction to determine questions of fact presented on petitioner's claims, or that the Circuit Court of Martin County had exclusive jurisdiction. The District Court had "exclusive and non-delegable control" and jurisdiction of the Debtor's property, of all persons asserting claims to the same in the Reorganization Proceedings, and of the claims so asserted. *Thompson v. Magnolia Petroleum Co.* (supra) and Sec. 205a, 205c (7), 205c (8), Title 11, U. S. Code 1941. For the reasons hereinabove stated, there was no lack of due process of law in the District Court and Circuit Court of Appeals in disposition of petitioner's claim. Nor are we able to agree that "the questions of fact . . . were whether the land conveyed by the Land Company in 1921 was in adverse possession

of the railroad at that time." There were many other questions of fact and of law presented to and decided by the District Court and Circuit Court of Appeals. See their respective opinions (Tr. 31-32 and 89-97).

C. DISCUSSION OF "QUESTIONS PRESENTED" IN THE PETITION.

While we will not at this point argue at any length the petitioner's six questions presented, we do feel that we should point out certain erroneous assumptions of fact or of law in the first four of these questions.

First Question

> "Can the district federal court dispose of a contested claim by a summary proceeding in bankruptcy, on an application for leave to sue the bankrupt?"

As we have hereinabove shown, the proceedings in the District Court were not summary, but even if the proceedings were summary the action of the District Court was entirely proper, as shown by our argument of this question hereinafter made.

Second Question

> "Can the federal district court claim that because a Florida corporation is adjudged a bankrupt that extends the jurisdiction of the federal court to hear and determine matters of law and fact that are in the sole jurisdiction of the State Court?"

The petition for leave to sue did not pray for leave to sue in the *State Court.* (Tr. 2). Nor did the State Court have any jurisdiction of the property of the Debtor or of liens claimed against the same. Section 205 (a), Title 11, U. S. Code 1941.

Third Question

> "Can a federal court construe leave to foreclose a vendor's lien as an application to sue in ejectment and can the equitable rule of laches be applied when on the face of the action the statute of limitations has not run against the claim and under the law of Florida injury from laches are questions of fact to be proven?"

There are actually three unrelated questions in this third question, and each of them contains unwarranted assumptions of fact or law. The Order and Memorandum (Tr. 30-32) of the District Court can not be fairly read as construing the petition for leave to sue as an application to sue in ejectment. Under the law of Florida and most other states, the doctrine of laches is not fast bound to statutes of limitation. The Florida law does permit the doctrine of laches to be applied when apparent upon the face of the complaint or petition. See 7th and 8th headnotes in *Norton v. Jones*, 83 Fla. 81, 90 So. 854, and see also *Wilkins v. Groves*, 155 Fla. 279, 19 So. 2d 834, holding a bill did not show laches on its face.

Fourth Question

> "If the District Court was wrong in assuming jurisdiction and in its judgments, was the Circuit Court of Appeals in error in not only affirming the lower court but also making added findings of fact for which there was no basis in the record?"

Here again there is more than one question. Under Section 205a, Title 11, U. S. Code 1941, as construed by this Court in *Thompson v. Magnolia Petroleum Co.* (supra), the District Court sitting in bankruptcy in reorganization proceedings of the Debtor, had "an exclusive and non-delegable control over the administration of" the "estate in its possession." The District Court could not have been wrong in assuming jurisdiction; it could have been, but was not, wrong in its judgments (Tr. 30, 31) denying the petition for leave to sue and a rehearing. For the same reasons the Circuit Court

of Appeals was not wrong in affirming. Moreover, the affirmance was properly based upon the part of the record made by petitioner, so that any incidental findings of fact from other parts of the record were harmless even if erroneous. But such findings of fact were not erroneous as the opinion of the Circuit Court of Appeals so clearly shows.

Fifth Question

> "If the Federal and State Constitutions forbid taking private property for public use without payment, can one with the right of eminent domain proceed by indirection and acquire such property by any other method?"

Sixth Question

> "Was the respondent guilty of padding the record on appeal?"

The correct answer to the fifth question is yes and to the sixth no.

D. REPLY TO "STATEMENT OF EVIDENCE" IN THE PETITION.

Both sentences under this heading of the petition for certiorari are incorrect. There were attached by petitioner to her petition for leave to sue (a) copy of map of the Commissioners in the partition suit culminating in the final decree of December 17, 1901 (Tr. 9); (b) copy of the Land Company's plat of 1913 (Tr. 10); and (c) the proposed Bill to Foreclose Lien (Tr. 3-8) which referred at length to the 1901 partition suit in the same District Court. The Bill to Foreclose Lien, the two maps and the partition suit reports, map and decree were all used as evidence by both the District Court and the Circuit Court of Appeals, and properly so. As a matter of fact, a purported copy of the 1901 final decree of partition was also attached by petitioner to her petition for leave to sue. "Photostatic copy of decree of Dec. 17, 1901, is elsewhere in this Record." (Tr. 8). Based upon

these papers alone—that is, petitioner's papers— the District Court and the Circuit Court of Appeals properly held that petitioner had not shown a prima facie case for any relief.

Hereinabove we have quoted at length from brief of respondent Trustees, as appellees in the Circuit Court of Appeals, as to what occurred at the hearing in the District Court. This has never been answered nor expressly denied by petitioner. Her statement in her petition for certiorari of "The petitioner was never given an opportunity to offer any" evidence is flatly contradicted by the recitals in the District Court's order denying her petition for leave to sue—"The Court, after due notice, having heard the evidence of the parties" (Tr. 30).

E. REPLY TO "REASONS RELIED UPON FOR WRIT OF CERTIORARI" IN THE PETITION.

I.

We have examined the nine decisions of this Court and of the twelve Circuit Courts of Appeal cited under this heading, and can only answer in the generality of petitioner. These cases do not set up any rules of law which were violated by the District Court and the Circuit Court of Appeals herein. We utterly fail to see the materiality of the *claim here first asserted* that petitioner was denied *"her right to a jury trial."* This is mere sophistry, as the petition for leave to sue was for permission to file and maintain in an appropriate competent court a "Bill to Foreclose Lien" (Tr. 2 and 3 and Pet. for Cert. p. 3). Foreclosure of liens in Florida is in chancery and there are no jury trials in chancery courts in Florida.

The notice in 1931 to creditors, pursuant to order fixing time for filing claims (Tr. 69, 70-72), in the Receivership proceedings, the Notice to Creditors in 1941, pursuant to order fixing time for filing claims in the Reorganization Proceedings (Tr. 43 and 48), and the hearing and disposition

by the District Court of the petition for leave to sue, filed long after time for filing claims in both the Receivership and the Reorganization proceedings had expired, were all in accordance with due process of law as defined by this Court:

> "Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."
>
> *Dohany v. Rogers*, 281 U. S. 362, text 369, 74 L. Ed. 904, text 912.

Northern Pacific R. Co. v. Concannon, 239 U. S. 382, 60 L. Ed. 342, holds that a particular railroad right of way granted by Acts of Congress cannot be lost to the carrier by adverse occupancy and possession by private individuals. There is no intimation in the opinion that the converse is true, and the Court had no occasion to, and did not, hold that a railway cannot acquire a right of way by adverse possession.

The case of *In re Macklem*, U. S. District Court, D. Maryland, 28 F. (2d) 417, does hold as stated by petitioner, but it was in a bankruptcy of an individual (a wife's dower in real estate of the bankrupt being also involved), and the rule therein stated is utterly inapplicable to railroad reorganization proceedings in view of the provisions of Section 205a, Title 11, U. S. Code 1941:

> "the court . . . shall during the pendency of the proceedings under this section and for the purposes hereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

See also Sections 205 (c) (7) and 205 (c) (8), of Title 11, U. S. Code 1941 and *Thompson v. Magnolia Petroleum*

Company (supra). Ever since the 1895 decision of *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67, it has been established that possession of the *res* by the Court of chancery through its receivers gives it exclusive jurisdiction to hear and determine all controversies affecting title, liens upon, possession and control of the property, although for convenience the court may allow an issue to be tried elsewhere.

Hill v. Gordon (Cir. Ct. N. D. Fla. 1891), 45 Fed. 276, did hold that a delay of twenty years in proceedings to enforce a judgment does not constitute laches on the part of the judgment holder where there are prior judgments that were liens on the land for more than its value, some of which a purchaser of the land had bought and was holding against it. As to application of laches the Court stated in its opinion:

> "The question of laches must be determined to a great extent upon the facts of each case."

The facts in the *Hill* case (supra) are quite different from those shown in the record herein. Here the record shows unexplained long failure of petitioner to file her claim within the time limited in a 1931 order in Receivership proceedings and in a 1941 order in Reorganization proceedings. Incidentally, laches under the Florida decisions is not a question of fact to be proved—it may also be shown by the pleadings of the party charged, nor is actual injury by the alleged laches a requisite in Florida—embarrassment or inconvenience is sufficient. 7th and 8th headnotes *Norton v. Jones*, 83 Fla. 81; 90 So. 854.

II.

Most of the eleven Florida Supreme Court decisions cited under this heading do expressly discuss or construe the various provisions of the Florida Constitution referred to or summarized by petitioner. The most pertinent one of the eleven is *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, which is directly contrary to the chief contentions of petitioner. In the *Hillsborough County* case (supra), which was an action to foreclose an equitable lien upon prop-

erty taken by the County which had not used its eminent domain power, the Court said:

> "Property unlawfully taken without compensation is not public property until it is paid for, or until the right to recover compensation for it *is lost or abandoned*, even though it has been devoted to the county benefit and is being used in the orderly administration of county government, such as for purposes of a highway and the like."

Cone Brothers v. Moore, 141 Fla. 420, 193 So. 288, cites with approval *Norton v. Jones*, 83 Fla. 81, 90 So. 854, in which earlier case the Court affirmed a dismissal of a bill showing laches on its face. In a later case of *Wilkins v. Groves*, 155 Fla. 279, 19 So. 2d 834, the Supreme Court of Florida upheld a bill as against motion to dismiss because it did not show laches on its face.

Sarasota v. Dixon, 146 Fla. 369, 1 So. 2d 198, does hold exactly as summarized by petitioner, but it does not help petitioner. Here we do not have any question of possession or right of possession of land as was involved in that case. As frequently stated by petitioner, the Florida court decisions only permit foreclosure by the former owner of a lien for the value of property taken by a public corporation failing or omitting to exercise its power of eminent domain (Pet. for Cert. p. 2). See also *Florida Sou. R. Co. v. Hill*, 40 Fla. 1, 23 So. 566, and *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393. Conceding, *arguendo*, that the Debtor in 1925 tortiously entered into possession of property then owned by petitioner (which are not the facts as found by both lower Courts), the petitioner under Florida law then and there lost her possession and right of possession of the land, so that she had none to further lose by laches. Here the laches consist of unexplained omission for fifteen years by petitioner to file her claim within time limited by orders in both the Receivership proceedings and the Reorganization proceedings, in both of which proceedings the District Court had exclusive jurisdiction of the Debtor's property. The door of the Court was open in the Reorganization proceedings until October 1941 for her to file or exhibit her claim therein,

but she waited until January 19, 1945, so to do. Sections 205 (c) (7) and 205 (c) (8), of Title 11, U. S. Code 1941, must be strictly enforced by this Court, as otherwise no railroad reorganization can ever be concluded.

III.

We assume that the opening two paragraphs under this heading of the petition for certiorari refer to Section 377, Title 28, U. S. Code 1941, but, as hereinabove noted, Section 347 (a) of Title 28 affords ample jurisdiction, and Section 347 (c) of Title 28 apparently prohibits the use of Section 377, Title 28, where Section 347 (a) of Title 28 is plainly applicable. As noted hereinabove in respect to *In re Macklem*, 28 F. (2d) 417, the jurisdiction of a District Court in Railway Reorganization proceedings is, by Section 77 of the Bankruptcy Act (Sec. 205 (a), 205 (c) (7) and (8), Title 11, U. S. Code 1941), exclusive as to all of the Debtor's property, wherever situated. The reference on page 12 of the petition for certiorari to "Justice Miller's dissenting opinion in *Peale v. Phipps*, 14 How. 368" is entirely an error. *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459, was an appeal from a U. S. District Court judgment rendered against a bank receiver who had been appointed by a Louisiana State Court. This Court reversed for want of jurisdiction of the District Court. There was no dissenting opinion, nor was there a Justice Miller then on the bench of this Court to have rendered any opinion therein.

The case of *In re Macklem* (supra) and the rules therein stated for ordinary bankruptcy proceedings—as to plenary suits and diversity of citizenship—simply do not apply to railroad reorganization proceedings.

We have shown hereinabove that the proceedings in the District Court were not summary. Even if they were, petitioner's own pleadings showed "that Plaintiff's case was without merit" as stated in the opinion by the Circuit Court of Appeals (Tr. 97).

We have also shown hereinabove that under the Florida decisions the right under the Florida Constitution to compensation for property taken for public purposes can be lost or abandoned, and this Court has repeatedly held that Federal constitutional rights can be waived.

F. RESPONDENTS' REPLY TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Having actually hereinabove answered the petition and pointed out its many unfounded conclusions of fact and law, to avoid repetition we will merely mention these errors as they are repeated in petitioner's brief, and try to confine ourselves to new matter or cases contained or discussed in the petitioner's brief.

We seriously doubt if the petitioner's brief complies with Rule 27, par. 1 (c), (d), (e) and (f) of the Rules of this Court. We do not know which one, if any of these required parts of a brief is intended to be covered by the petitioner's "Preamble", but we will also reply to the Preamble.

REPLY TO "PREAMBLE."

The District Court below did have "exclusive non-delegable control and jurisdiction" over the Debtor's property and all claims against the same filed or exhibited in the District Court. Section 205 (a), 205 (c) (7) (8), Title 11, U. S. Code. The proceeding in the District Court on petitioner's claim was not summary, and not without any evidence. The law applied by the District Court was in harmony with the applicable law of the State of Florida.

A comparison of the District Court's "Memorandum" (Tr. 31) with the opinion of the Circuit Court of Appeals (Tr. 89-97) will clearly show no different or new findings by the Circuit Court of Appeals—it merely stated the findings of the District Court in more detail. As the Circuit Court of Appeals had before it the entire record made in the District

Court on petitioner's claim, the Circuit Court of Appeals very properly examined the whole record in passing upon petitioner's very broad and vague "Statement of Points" (Tr. 39-41) in her appeal.

At all times from the inception of the Receivership proceedings September 1, 1931 until the commencement of the Reorganization proceedings February 1, 1941, the petitioner could have filed her claim or filed a petition for leave to sue in the Receivership proceedings, and the District Court having jurisdiction of the property of the Debtor had jurisdiction to grant or deny the claim, or grant or deny leave to sue thereon in the District Court, or even in an appropriate State court. *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67. Whether the District Court would have allowed the claim or granted leave to sue, if so presented in the Receivership proceedings, would have been a matter in the regulated discretion of that Court. *State of Texas v. Campbell*, (Cir. Ct. of App. 5th Cir. 1941), 120 F. (2d) 191; *Findlay v. Florida East Coast Railway Co.* (U. S. Dist. Ct. S. D. Fla. 1933) 3 Fed. Supp. 393, and as affirmed by Circuit Court of Appeals 5th Circuit 68 F. (2d) 540, text 542-43; *Jordan v. Wells* (Cir. Ct. N. D. Ga. 1878), 3 Woods 527, 13 Fed. Cases, p. 1111. See also 45 *Amer. Juris.* Sec. 460, and 53 *Corpus Juris*, Receivers, p. 338.

On and at all times after February 1, 1941, when the District Court granted a creditor's petition for the reorganization of Florida East Coast Railway Company under Section 77 of the Bankruptcy Act (Sec. 205 Title 11, U. S. Code), the District Court had exclusive non-delegable control over the administration of the (Railway Debtor's property) "estate in its possession". *Thompson v. Magnolia Petroleum Co*, 309 U. S. 478, 84 L. Ed. 876. Petitioner was, after February 1, 1941, confined to the Reorganization proceedings and could not elsewhere prosecute her claim. The District Court promptly heard her claim when presented in the Reorganization proceedings. As this Court has repeatedly upheld Section 77 of the Bankruptcy Act, all of petitioner's asserted rights under the Florida Constitution necessarily

were subject to the higher law of this land—Art. I, Sec. 8, Cl. 4, of the United States Constitution and the Act of Congress thereunder—Section 77 of the Bankruptcy Act. (Sec. 205, Title 11, U. S. Code).

The title of Florida East Coast Railway Company to certain lands in the Hanson Grant in Martin County, Florida, questioned by petitioner, did not involve any peculiar unsettled point of Florida law authorizing the District Court to grant leave to litigate the point in a state court of Florida, as was decided to be appropriate under such circumstances, by this Court, in *Thompson v. Magnolia Pet. Co.* (supra). As a matter of record herein the Railway Debtor's title or claim of title was based upon the 1901 final decree in partition of the District Court below (Tr. 11-15, 31-32, & 89-97). The essential question of fact and law relating to the Debtor's title to its right of way was what was the width of the right of way acquired under the 1901 partition decree which did not state the width. Both courts below on the evidence of the two plats, copies of which were tendered by the petitioner with her petition for leave to sue, held the width to be 100 feet. Both courts also had the benefit of copies of additional recorded plats made by petitioner's predecessor in title, the Land Company, and both courts also had evidence adduced by these respondents as to right of way monuments and pole lines in 1915 on both edges of the 100-foot right of way. However, petitioner's own exhibits, the two plats and the 1901 final decree in the partition suit, were ample for the District Court and the Circuit Court of Appeal to determine (as they did) that the Debtor's title was good and that petitioner and her predecessor, Land Company, never had or acquired any title to any part of the 100-foot right of way in question, and therefore could have no lien on the same.

We have hereinabove quoted from *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, holding that a claim for compensation for land taken for public purposes can be "lost or abandoned". Those words are in the opinion, and all of the general argument of petitioner to the contrary cannot alter that fact or the law of Florida as so established.

We will hereafter show that by the great weight of decisions and text authorities corporations clothed with the power of eminent domain can acquire good title to land by adverse possession. These two principles are plainly also supported by *Florida Sou. R. Co. v. Loring* (Cir. Ct. of App. 5th Cir. 1892), 51 Fed. 932, and *Seaboard Air Line Railway v. Atlantic Coast Line Railroad Co.*, 117 Fla. 810, 158 So. 459.

QUESTIONS PRESENTED.

Argument of First Question

"Can the Federal District Court Dispose of a Bona Fide Contested Claim by a Summary Proceeding in Bankruptcy on an Application for Leave to Sue?"

The proceeding in the District Court was not summary, nor was jurisdiction of the property of Florida East Coast Railway Company acquired in 1931 by the District Court under Section 205, Title 11 of the U. S. Code. The 1931 jurisdiction was acquired on a bill of a general creditor and in May 1932 on a bill of a Mortgage Trustee. *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67, is a sufficient answer to any contention that the District Court did not obtain full jurisdiction in such railway receivership proceedings of all of the property of Florida East Coast Railway Company, and also jurisdiction to determine in its discretion all controversies and claims concerning such property, irrespective of citizenship of the claimants. In 1887 Congress relaxed the prior strict rule and enacted what is now Section 125 (formerly Section 66), Title 28, Judicial Code and Judiciary U. S. Code 1941, permitting Federal Court Receivers to be sued "in respect to any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed." The substance or equivalent of this statute was incorporated into Section 77 of the Bankruptcy Act. See Section 205 (j), Title 11, Bankruptcy, U. S. Code. The present proceeding is not one growing out of the operation or administration of the properties by the Receivers (1931

to 1941) or Trustees (1941 to date); it is an attempt to impress a lien upon property, previously in the custody of the Receivers and now vested in the Trustees, arising out of actions of the corporation prior to 1931. It is an attempt to impress a lien upon *res*, the possession and title of which is now vested in the Trustees under bankruptcy proceedings.

Conceding (but not admitting) that the District Court disposed of the petition for leave to sue in a summary proceeding, and that the District Court could have properly applied general equity receivership procedure and, if the petition for leave to sue were otherwise proper, granted the same, we say that the petition did not, by far, meet the fundamentals of such equity procedure, and was properly denied by the District Court under the following authorities:

Volume 53, *Corpus Juris*—Receivers, at page 338, in respect to leave to sue, says:

> "(§ 552) b. Granting Leave or Disposing of Controversy—(1) Proceedings in General. The application for leave to sue a receiver should be made to the court which appointed him, and the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the petitioner has no cause of action. The application is in effect a motion in the cause, of which the receiver should have notice, and, it has been held, cannot be granted in any other cause than that in which the receivership is pending."

In *Durand & Co. v. Howard & Co.*, (Circuit Court of Appeals, Second Circuit, July 1914), 216 Federal Reporter 585, L.R.A. 1915 B, page 998, the Court said:

> "It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere." Citing and quoting extensively from *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815; and further stating:
>
> "In refusing its consent to allow a suit to be brought in the state courts the court had all the facts before it,

and it came to the conclusion that the right which the landlords seek to enforce against the receivers did not exist. When a court can see from the facts stated that the so-called right is not a right, it is not even called upon to exercise its discretion and determine whether or not it will permit a suit to be brought in another court against its receivers, thereby exposing them to the costs of a needless and fruitless litigation at the expense of the creditors."

216 Fed. Rep. 585, 588, 589.

In *Findlay v. Florida East Coast Ry Co.*, (U. S. Dist. Ct. Sou. Dist. Fla., April 1933), 3 Fed. Supp. 393, the District Court denied leave to sue the Receivers of Florida East Coast Railway Company because:

"Without the presence in this suit of the above-named defendants, no useful purpose can be served by permitting the court's receivers, appointed in the consolidated equity cause, to be joined as parties defendant herein. To permit their joinder, and require them to litigate herein in this state of the case, would subject the receivership estate to unnecessary and futile expense. An order, therefore, will be entered in the consolidated receivership cause denying leave to join the receivers herein. Jordan v. Wells, 13 Fed. Cas. page 1111, No. 7525."

The decision of the District Court was expressly affirmed by the Circuit Court of Appeals for the Fifth Circuit on January 24, 1934, under the same name, 68 F. (2d) 540; certiorari denied under same title in 292 U. S. 623, 78 L. Ed. 1478. In the concluding portion of Judge Hutcheson's opinion it is stated:

"From these views it follows that the suit was not maintainable; that Kenan and Haines, and the trustees in the mortgage, were properly absolved from answering in it; that the court was right in declining to permit the vain thing of having the receivers appear in a cause which could not be maintained, and that he was right in dismissing the bill.

"The judgment is affirmed."

68 F. (2d) 540, text 542-543. Cert. denied 292 U. S. 623, 78 L. Ed. 1478.

In *Jordan v. Wells*, 3 Woods, 527, (Circuit Court, N. D. Georgia, March 1878), 13 Fed. Cas. page 1111, in his opinion therein Circuit Judge Woods said:

> " . . . it is essential that the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing the plaintiff has no cause of action. Do the facts set out in this petition show that the petitioner has a case against the receiver on which he ought to recover? * * * * the petitioner does not make out a *prima facie* case, and his petition for leave to sue the receiver must be denied."

Bearing in mind:

(a) The difference between Federal Court railway receiverships, which involve the public welfare, and ordinary receiverships;

(b) The 1887 Act of Congress permitting such receivers to be sued without leave of court, in respect to their operation of the receivership estate, but not authorizing actions involving the *res* in the possession of the Receivers; and

(c) The statutory jurisdiction of the Federal Court in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, there is no real conflict among the several Federal District and Circuit Courts of Appeal, nor between them and state courts, as to suits against receivers or trustees, with or without leave of the court appointing them. All of the cases cited by petitioner can readily be harmonized or distinguished.

Argument of Second and Third Questions

"Can a Federal District Court Claim That Because a Corporation That Is Organized Under the Laws of the State in Which That Court Sits and Is Adjudged a Bankrupt by That Court, Extend Its Jurisdiction to Hear and Determine Matters of Law and Fact That Except of the Bankruptcy Proceedings

> are Within the Sole Jurisdiction of the State Circuit Court and the Venue is in the County Where the Land in Question is Situated?"

It will be noted that in combining on page 25 of her brief her second and third questions separately stated on page 8 of the petition for writ of certiorari petitioner has cured most of the erroneous assumptions in the separately stated second and third questions. The answer to this combination of the second and third questions is plainly no. Sections 205 (a) and 205 (c) (7) and (8), of Title 11, Bankruptcy, U. S. Code 1941, conferred upon the District Court exclusive jurisdiction of the property of the Debtor herein, wherever situated, and of all claims thereto filed or exhibited in such Reorganization proceedings. As the requisite order fixing time for filing claims (Tr. 43) and notice thereof were duly entered or given in the proceedings below, it is therefore unnecessary to discuss in much detail the several cases cited by petitioner under this heading. We have heretofore stated most of the Florida law on the doctrine of laches. We did make a statement, in substance, that under the law of Florida the doctrine of laches does not closely follow for the time element the statute of limitations.

> "There is no rule defining what lapse of time will bar a purely equitable demand. Each case must depend upon its circumstances."
>
> 6th syllabus by court, *Amos v. Campbell*, 9 Fla. 187.

Amos v. Campbell (supra) was cited with approval by the Florida Supreme Court in *Cone Brothers Construction Co. v. Moore* (decided in 1940), 141 Fla. 420, 193 So. 288.

If petitioner had a claim, it was not a legal claim but an equitable one for the value of land taken by a public corporation having, but failing to exercise, the power of eminent domain. There is no statute of Florida creating a lien under such circumstances. The lien is one created by the Florida chancery courts to fit the situation. The earliest case declaring such a lien is *Florida Southern R. Co. v. Hill*, 40 Fla.

1, 23 So. 566. In *Special Tax School District v. Hillman*, 131 Fla. 725, 179 So. 805, the court declared a lien for the value of land purchased for public school purposes, but for the purchase price of which invalid notes and an invalid mortgage had been given. On the authority of its prior decision of *Shaylor v. Cloud*, 63 Fla. 608, 57 So. 666, the court, in *Special Tax School District v. Hillman* (supra), held that the lien so created by it would be barred in equity at the same time that the "remedy at law for recovery of the unpaid part of the purchase price of the land is barred by the statute of limitations"; also that the Florida statute of limitation of three years applied to the school land transaction, but that the three years had not in fact run. Therefore, accepting petitioner's own contention that the Debtor Railway tortiously entered upon her land in 1926, her equitable lien was, under the Florida law, barred in three years, or at the end of 1929, and therefore at least eighteen months before petitioner was enjoined from suing in the state court by the Receivership proceedings commenced in the District Court September 1, 1931. However, petitioner actually was barred by the Florida seven year statute of limitation:

> "95.12 Real Actions; limitations generally.—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within seven years before the commencement of such action."
>
> Section 95.12 Florida Statutes 1941.

because the evidence showed, as found by the District Court (Tr. 30), that as early as 1915 the Railway Debtor's possession and use of a 100-foot in width right of way was evidenced by right of way monuments and telegraph pole lines. The Florida seven year statute of limitation had actually run twice in succession between 1915 and September 1, 1931, when the Receivership proceedings were commenced in the District Court.

Argument of Fourth Question

'If the District Court Was Wrong in Assuming Jurisdiction and in the Rendition of Its Judgments, Was the Circuit Court of Appeals in Error in Not Only Affirming the Lower Court But Also Making Added Findings of Fact That the Land Was in Adverse Possession of the Railway When the Land Company Executed and Delivered Its Contract and Deed?"

The District Court could not have been wrong in assuming jurisdiction because, as stated many times hereinabove, it had exclusive jurisdiction of the Debtor's property and all claims thereupon filed in the Reorganization proceeding shown in the record, and pursuant to Sections 205 (a) and 205 (c) (7) and (8), Title 11, Bankruptcy, U. S. Code 1941. We have also shown hereinabove that the proceeding was not summary. The District Court in its order denying petition for leave to sue entered the order (Tr. 30) "after due notice, having heard the evidence of the parties, and the argument of their counsel". Petitioner is mistaken as to a pole line being only on the east side of the tracks. The Postal Company's standard telegraph pole line with cross arms "according to Debtor's records, overhung and yet overhangs the west right of way line of the aforesaid 100 foot in width right of way" (Tr. 17); also a "1915 survey of the Debtor's property shows that there were eighteen (18) right of way monuments (Nine (9) on each side) at distances of 49.5' and 50' from the center line of the then main track of the Debtor through the north half of the said Hanson Grant." Seventeen of these eighteen right of way monuments were shown on an I.C.C. Bureau of Valuation survey made in 1916. Ten of the original right of way monuments, being seven on the west side (towards petitioner's land) and three on the east right of way line, were in place the latter part of 1944. (Tr. 15, 16). The Debtor did rely upon the final decree of December 17, 1901, in the partition suit, as well as upon the two sets of plats filed by petitioner's predecessor in title, the Land Company (Tr. 18). These facts appeared from the

Trustees' Report to the Court upon the petition for leave to sue. They were in no way denied by petitioner.

Argument of Fifth Question

> "If the Federal and State Constitutions Forbid Taking Private Property for Public Use Without Payment, Can a Corporation with the Right of Eminent Domain Proceed by Indirection and Acquire Such Property by Any Other Method?"

In addition to *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, wherein the Florida Supreme Court held that right to compensation for land taken for public purposes can be "lost or abandoned", the Florida Supreme Court has expressly held that one railroad in Florida can acquire by adverse possession the land of another Florida railroad. See *Seaboard Air Line Railway Co. v. Atlantic Coast Line Railroad*, 117 Fla. 810, 158 So. 459. The standard text authorities on eminent domain all hold that:

> "According to the weight of authority the fact that a corporation is endowered with the power to take land under the power of eminent domain on making just compensation therefor does not prevent it from acquiring title by adverse possession."
>
> Vol. 2, *Corpus Juris*—Adverse Possession, 229.

To the same effect, see:

Vol. 1, *American Jurisprudence*—Adverse Possession, Section 27, page 806.

Vol. 2, *Nichols on Eminent Domain* (2nd Edition), Section 344, pages 959 and 960.

Vol. 2, *Lewis Eminent Domain* (Third Edition), Section 967, page 1714, and

Case note "Right of Corporation to Acquire Title by Adverse Possession" in *Annotated Cases* 1915C, page 772.

These authorities state that the minority view is followed only by North Carolina and Pennsylvania. Of course this

minority holding does not violate any rights under the Federal Constitution because this Court has held:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute."
>
> *Pierce v. Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316.

Because of the insistence of petitioner in her petition and brief that constitutional rights cannot be waived or barred by statutes of limitation, we cite to this Court *Bostwick v. Baldwin Drainage District* (Circuit Court of Appeals, Fifth Circuit, November 1945), 152 F. (2d) 1, (Cert. denied ——U. S. ——, 90 L. Ed. 764). Therein Circuit Judge Lee said:

> "The right claimed to be protected by the Fourteenth Amendment was violated, if it was infringed at all, by the other acts and omissions of which appellants complain. The acquiescence which estopped them to enforce their particular rights likewise operated as a waiver of the general right to enforce due process."

Petitioner cites *Northern Pacific Railway Co. v. Concannon*, 239 U. S. 382, 60 L. Ed. 342, but there this Court merely held that a particular railroad right of way granted to the railroad by Act of Congress could not be lost to the railroad by adverse possession by private individuals. There is no intimation in the opinion of this Court that the converse is true, and this Court had no occasion to and did not hold that a railroad could not acquire right of way by adverse possession. The same holding, under practically the same facts except it was a state grant, was made by the Florida Supreme Court in *Seaboard Air Line Railway Co. v. Special R. & B. Dist.*, 91 Fla. 612, 108 So. 689. In that case the court dealt solely with the acquisition of title to land by adverse possession as against a railroad holding the same under a state grant.

Petitioner attempts to construe the 1913 plat of predecessor Land Company, copy of which was attached to her petition for leave to sue (Tr. 10), merely as an offer of dedication of the 100-foot railway right of way shown thereon. But peti-

tioner has admitted that the Debtor Railway obtained title under the 1901 final decree in the partition suit to some width of right of way at this exact location (Pet. for Cert. p. 4). Petitioner is therefore contending that her predecessor Land Company, by its 1913 plat, offered for dedication the Railway's original 1901 partition decree right of way as well as additional land up to a total width of 100 feet. The absurdity of such contention is apparent on its face. A land company does not offer for dedication land that it does not own. If it had done so it would have been slandering the title acquired by the Railway (for some width, if not the 100 feet) under the 1901 final decree.

Argument of Sixth Question

"Was the Respondent Guilty of Padding the Record on Appeal?"

We have shown several times hereinabove that the District Court had "exclusive non-delegable control" (*Thompson v. Magnolia Petroleum Co. supra*) of the administration of the Debtor's estate in this proceeding for the Reorganization of a Railroad under the Bankruptcy Act amendment. We have also shown that there was no novel point of state law to be decided warranting the Court, for the convenience of the parties, in referring the parties to a state court for decision on an undecided point of state law (*Thompson v. Magnolia Petroleum Co. supra*). It was, therefore, the duty of the District Court to determine petitioner's claim. We have also shown that the Court did not proceed in a summary manner. Even assuming that the District Court did act in a summary manner (which is not shown by the record), as was clearly stated by the Circuit Court of Appeals in its opinion: "We think that if none of these extrinsic documents put in evidence by appellees had been received, it would nevertheless have clearly appeared that the plaintiff's case was without merit and that the lower Court did not abuse its discretion in denying plaintiff the right to sue." (Tr. 97, and see report of such decision in 154 F. (2d) 963). On this same point see also the cases of *Durand & Co. v.*

Howard & Co. (C.C.A. 2nd Cir. 1914), 216 Fed. Rep. 585, L.R.A. 1915B, page 998; *Findlay v. Florida East Coast Railway Co.* in the District Court as well as the Circuit Court of Appeals (*supra*); *Jordan v. Wells* (*supra*); and Vol. 53 *Corpus Juris*—Receivers, page 338, which we have hereinabove discussed.

As a matter of fact, nearly all of the record from the District Court to the Circuit Court of Appeals, which petitioner claims was padded, went to the Circuit Court of Appeals upon the express order of the District Court (Tr. 81). Therefore petitioner's complaint as to the size of the record is against an action of the District Court and not the respondent's, and it will be noted from the record that petitioner did not complain in the Circuit Court of Appeals about the order of the District Court correcting the record on appeal (Tr. 81).

We feel that we have already answered, somewhat at length, the five reasons for granting certiorari of the petitioner on page 40 of her brief.

We respectfully submit that petition for certiorari should be denied.

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